

FCC MAIL SECTION

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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DIST. BY CS Docket No. 94-46 ✓

NOTICE OF PROPOSED RULE MAKING  
AND  
ORDER

Adopted: May 13, 1994;

Released: June 9, 1994

Comments Due: July 11, 1994

Reply Comments Due: July 26, 1994

By the Commission:

In the Matter of

Amendment of Part 22  
of the Commission's  
Rules to Delete Section 22.119 and Permit  
the Concurrent Use of Transmitters  
in Common Carrier and Non-Common Carrier  
Services

RM 8367

In re Requests of

Paging Network, Inc.	MSD 93-31
PacTel Paging	MSD 93-32
Arch Communications Group, Inc.	MSD 93-33
Metrocall, Inc.	MSD 94-5
American Paging, Inc.	MSD 94-6
Mid-Atlantic Paging Company, Inc.	MSD 94-7
MobileMedia Communications, Inc.	MSD 94-11

For Waiver of Section 22.119 of the  
Commission's Rules to Permit Concurrent  
Licensing of Paging Transmitters under  
Part 22 and Part 90 of the Commission's  
Rules

## I. INTRODUCTION

1. By this Notice of Proposed Rulemaking we propose to delete Section 22.119 of the Commission's Public Mobile Service Rules, 47 CFR 22.119, which prohibits the concurrent licensing and use of transmitters for common carrier and non-common carrier purposes. We propose to permit the joint licensing and use of transmitters in the common carrier and private carrier services. In addition, we are granting interim waivers of Section 22.119 to Paging Network, Inc. (PageNet), PacTel Paging (PacTel), Arch Communications Group, Inc. (Arch), Metrocall, Inc. (Metrocall), American Paging, Inc. (API), Mid-Atlantic Paging Company Inc. (Mid-Atlantic) and MobilMedia Communications, Inc. (MobileMedia)<sup>1</sup> to the extent set forth below, during the pendency of this rulemaking. This action will allow them to use transmitters presently licensed for common carrier paging purposes to also provide private carrier paging service.

## II. BACKGROUND

2. Section 22.119<sup>2</sup> of the Commission's Rules prohibits the concurrent licensing and use of a transmitter to provide common carrier services under Part 22 of the Rules for non-common carrier communication purposes. Although the regulatory history is silent on the purpose of this rule, we believe that the original intent of Section 22.119 was to assure that the capacity of radio common carrier transmitters is devoted to common carrier services in an effort to protect subscribers to these services from unnecessary delays and interruptions in service.<sup>3</sup>

<sup>1</sup> See Request for Waiver filed by Paging Network, Inc., April 6, 1993; amended July 15, 1993 and November 2, 1993 (PageNet Waiver Request); Request for Waiver filed by PacTel Paging, August 31, 1993 (PacTel Waiver Request); Request for Waiver filed by Arch Communications Group, Inc., September 22, 1993 (Arch Waiver Request); Request for Waiver filed by MetroCall Inc., November 30, 1993 (Metrocall Waiver Request); Request for Waiver filed by American Paging Inc., December 10, 1993 (API Waiver Request); Request for Waiver filed by Mid-Atlantic Paging Company, December 7, 1993 (Mid-Atlantic Waiver Request) and Request for Waiver filed by MobilMedia Communications, Inc., March 7, 1994 (MobileMedia Waiver Request). Each company currently is a licensee of numerous Part 22 and Part 90 facilities. As explained below, a grant of these waivers will serve the public interest.

<sup>2</sup> Section 22.119 (1992) states:

Transmitters licensed for operation in services governed by this part [22] may not be concurrently licensed or used for non-common carrier communication purposes. However, mobile units may be concurrently licensed or used for non-common carrier purposes provided that the transmitter is type-accepted for use in each service.

<sup>3</sup> This rule was originally in Part 21 of the Commission's Rules, and was incorporated into Part 22 in 1979 when the public mobile service and public fixed service rules were separated into discrete rule parts. See *Domestic Public Fixed Radio Services and Public Mobile Radio Services*, FCC Docket No. 79-595, 46 RR 2d 652 (1979). The rule section was carried over into the major revision of Part 22 in 1983, but largely without comment. See *Revision and Update of Part 22 of the Public Mobile Radio Services Rules*, 95 FCC 2d 769 (1983).

### III. DISCUSSION

3. Several developments in the mobile communications industry have made it appropriate to reevaluate the Section 22.119 prohibition. Advances in technology have caused transmitter capacity to increase significantly. For example, improvements in digital transmission techniques and increases in transmission rates, coupled with advanced store and forward technologies,<sup>4</sup> enable a single transmitter to serve over 300,000 paging units. According to PacTel, it is working with manufacturers to develop 6400 bits per second (bps) transmission rates which will accommodate over 800,000 subscribers on a single paging channel.<sup>5</sup> PageNet states that it currently has deployed technology which can accommodate 400,000 paging units on a single 25 kHz channel.<sup>6</sup> These dramatic increases in capacity reduce the need for a transmitter to be devoted on a full time basis to common carrier uses in order to provide high quality service to the public, particularly in markets where total capacity exceeds current demand.

4. To meet marketplace demand for wider-area coverage, some licensees have begun to offer regional and national private carrier paging service as an overlay to their more localized common carrier paging services. The present rule requires such carriers to construct dedicated private carrier facilities which are duplicative of their existing local systems, thereby imposing unnecessary costs on carriers, which could result in higher subscriber charges.<sup>7</sup> The impact of these unnecessary costs is likely to be exacerbated because we expect the penetration rate for nationwide and broad regional services to be lower at the outset than for long established local services. In markets where an operator's local common carrier transmitters are not loaded to capacity (e.g., in markets the licensee has recently entered or in smaller markets) there are substantial economies the licensee could obtain by initially sharing transmitters when building out a regional or nationwide system without in any way diminishing the licensee's current or projected quality of service. Under these circumstances, the present requirement of Section 22.119 appears to be contrary to recent Commission actions which encourage licensees to devote unused capacity to auxiliary or incidental communications services that will meet public needs.<sup>8</sup>

5. The Omnibus Budget Reconciliation Act of 1993 (the 1993 Budget Act)<sup>9</sup> enacted by Congress further amends Section 3(n) and Section 332 of the Communications Act of 1934 to create a comprehensive regulatory framework for all mobile services, including existing Part 22 common carrier mobile services, private land mobile services, and future services, such as Personal Communications Services (PCS). The 1993 Budget Act also amends the Communications Act to specify a single "commercial mobile radio service."<sup>10</sup> We have since adopted a comprehensive Order implementing the basic provisions of Sections 3(n) and 332 of the Act, as amended by the 1993 Budget Act.<sup>11</sup> In addition, we recently adopted a Further Notice of Proposed Rulemaking that begins the process of conforming technical, operational, and licensing rules applicable to commercial mobile radio service (CMRS) providers that are subject to Part 22 and Part 90 of the Commission's Rules.<sup>12</sup> We do not believe that anything in the legislation or rulemaking is inconsistent with our proposal here.

6. Finally, the paging industry has become increasingly competitive. Allocations of new spectrum,<sup>13</sup> the relaxation of federal and state barriers to entry,<sup>14</sup> and the growth of subscriber demand have resulted in numerous well-financed competing paging entities in virtually every market. These companies compete on the basis of geographic service area, customer service, enhanced services, and price. This highly competitive environment encourages paging carriers to provide an acceptable quality of service or risk losing customers to competitors. These competitive incentives provide us with additional assurances that service to existing customers will not suffer from the joint use of transmitters.

7. Because of these developments, we tentatively conclude that permitting a single transmitter to operate on both common carrier and private carrier channels will not disrupt or impair service to existing Part 22 subscribers. Nevertheless, we seek comment whether Section 22.119 should be retained but modified to permit the concurrent use of transmitters in the common carrier and non-common carrier services in limited circumstances. For example, we could permit the joint use of transmitters licensed under Part 22 only where carriers are offering services that are different in kind (e.g., nationwide vs. regional service; local vs. regional service). Another option is to permit such

<sup>4</sup> Under store and forward technology, pages are batched and then sent as a group. The transmission time is the same regardless of the number of paging messages in the group.

<sup>5</sup> PacTel Waiver Request, p. 2, n.3. PacTel states that it encouraged the major manufacturers to build 2400 bits per second (bps) pagers, which is a doubling of capacity of existing systems.

<sup>6</sup> PageNet Waiver Request, p. 3.

<sup>7</sup> For example, PacTel estimates that the cost to construct its entire nationwide and regional PCP systems on a stand-alone basis will be approximately \$13 million. PacTel Waiver Request, p.3. PageNet estimates that it can save or defer expenditures up to \$8 million dollars through concurrent use of transmitters for common carrier and non-common carrier services in building regional systems. PageNet Waiver Request, p.4.

<sup>8</sup> *Revision and Update of Part 22 of the Public Mobile Radio Service Rules*, 95 FCC 2d 769, 816-819 (1983) (adopting 47 CFR §22.308); *Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, 3 FCC Rcd 7033 (1988) (adopting 47 CFR

§22.930).

<sup>9</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993).

<sup>10</sup> 47 U.S.C. §332(c)(1) (1993).

<sup>11</sup> *See Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994), *erratum*, 59 Fed. Reg. 18493 (April 19, 1994).

<sup>12</sup> *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Further Notice of Proposed Rulemaking, FCC 94-100, adopted April 20, 1994.

<sup>13</sup> *See Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Services*, 89 FCC 2d 1337 (1982).

<sup>14</sup> *See, e.g., Public Mobile Radio Services*, 82 FCC 2d 152 (1980) (elimination of financial qualifications showing); *Public Mobile Radio Services*, 69 FCC 2d 398 (1978) (elimination of prior state certification requirement); *Revision and Update of Part 22 of the Public Mobile Radio Services Rules*, 95 FCC 2d 769 (1983) (reducing application requirements).

joint use only in circumstances where the Part 22 licensee uses a batched paging function as a part of its shared transmission system. We also seek comment on whether there are other circumstances in which we should not permit the shared use of transmitters licensed under Part 22. We solicit comment on appropriate safeguards to prevent warehousing of exclusively assigned frequencies if we modify or eliminate Section 22.119. Finally, we seek comment on whether we should allow two different licensees to share the same transmitter.

#### IV. WAIVER ORDER

##### A. Background

8. PageNet, API and Mid-Atlantic seek waivers of Section 22.119 of the Commission's Rules to permit them to share transmitters on any of their existing and future common carrier authorizations with any of their private carrier paging authorizations. PacTel, Metrocall and MobileMedia seek waivers of Section 22.119 of the Commission's Rules to permit them to transmit on PCP frequencies using their existing Part 22 common carrier paging transmitters until either (a) the two services are combined and Section 22.119 is eliminated, or (b) the multifrequency transmitters are loaded to 75% of available airtime.<sup>15</sup> Arch requests a waiver of Section 22.119 to permit it to operate frequency-agile transmitters capable of alternating between transmission of signals to common carrier and private carrier subscribers to permit the inclusion of PCP frequencies capable of providing broad regional and nationwide service on Part 22 transmitters offering local service.<sup>16</sup>

##### B. Discussion

9. Section 22.19 of the Commission's Rules sets forth the requirements for waiver requests. An applicant must demonstrate that: (a) the underlying purpose of the rule will not be served in the absence of a waiver, and grant of the waiver is in the public interest; or (b) the unique facts and circumstances of a particular case render application of the rule inequitable or contrary to the public interest and there is no reasonable alternative. 47 CFR §22.19. See *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>15</sup> In support of its waiver request, PacTel states that many of its subscribers are demanding nationwide and regional coverage extending beyond PacTel's current coverage areas. Because PacTel's common carrier frequencies were not available nationwide or over these larger regions, PacTel applied for and was granted nationwide Part 90 PCP authorizations. PacTel has begun constructing its nationwide and regional PCP paging systems. PacTel states that the waiver will allow it to reduce its operating costs by eliminating the need for unnecessary construction of transmitters for its nationwide and regional PCP systems. As noted, PacTel estimates these construction costs at \$13 million. PacTel projects that the first several years of operation will result in substantial losses from depreciation and site rent which must be recouped in the service price. If PacTel is permitted to make full use of its existing infrastructure, it will realize significant cost savings, and would be able to pass these savings along to its subscribers by offering lower prices. PacTel Waiver Request at pp. 2-4.

<sup>16</sup> In support of its waiver request, Arch states that it has undertaken to develop a nationwide paging system to satisfy the needs of its customers; however, the lack of a common carrier nationwide paging channel has caused Arch to develop a nationwide private carrier system. Arch presently has applications

10. PageNet, PacTel, Arch, Metrocall, API, Mid-Atlantic, and MobileMedia have satisfied the requirements of Section 22.19 of the Rules under alternative (a). Each is currently in the process of constructing nationwide or regional PCP systems with coverages extending beyond existing licensed Part 22 systems. The waiver sought by each will permit it to use its existing infrastructure, thereby achieving a significant cost savings which will result in the provision of service sooner and at lower rates to its subscribers. Granting the waivers will also benefit the public by reducing construction costs and carrier resources devoted to paging services, reducing the number of transmitter sites necessary and thereby lowering the costs at which service is made available to the public. Reducing the number of sites also will reduce environmental and public concerns regarding multiple transmitters on sites. Finally, there are no reasonable alternatives to the waiver that could achieve these public interest benefits.

11. Furthermore, the apparent underlying purpose of the rule will not be undermined by granting the instant waivers. There is no reason to believe that petitioners will have inadequate capacity to serve their common carrier customers.

12. PacTel, PageNet, Arch, Metrocall, API, Mid-Atlantic, and MobileMedia have demonstrated that it is in the public interest to allow them to share their common carrier and private carrier paging transmitters in circumstances where such sharing will facilitate the provision of national and/or regional service as an overlay to local services. These waivers will be conditioned on our actions in the rulemaking proceeding, wherein we will consider whether such sharing should be permitted or subject to various safeguards or standards.<sup>17</sup> Accordingly, PageNet,<sup>18</sup> PacTel, Arch, Metrocall, API, Mid-Atlantic, and MobileMedia will be allowed during the pendency of this rulemaking, to operate transmitters authorized under Part 22 for both common carrier and private carrier paging in accordance with their respective waiver requests.

pending for authority to construct facilities operating on three private carrier frequencies (929.8375, 929.3625, and 929.7875 MHz) at approximately 1,300 sites throughout the nation. Many of these sites are identical to locations where Arch currently owns and operates Part 22 common carrier facilities on 931 MHz. Arch seeks to avoid unnecessary duplication of facilities and states that it will greatly reduce operating costs if allowed to share transmitters between common and private carrier services. Arch Waiver Request at pp. 2-3.

<sup>17</sup> The grants of waivers to PageNet, PacTel and Arch in this order are without prejudice to any future action the Commission may take to restrict the use of common transmitters in multiple services to deter warehousing.

<sup>18</sup> On November 24, 1993, SkyTel Corporation (SkyTel) submitted comments responding to PageNet's waiver request. Although we are not required to do so, we have reviewed SkyTel's comments and find that they lack merit. As we have indicated above, we find that PageNet's requested waiver will serve the public interest. In any event, we emphasize that our grant of PageNet's waiver request is conditioned on the outcome of this rulemaking proceeding. Finally, we point out that in light of our proposal to delete Section 22.119 of the Rules, SkyTel will have an opportunity to file formal comments in this proceeding.

## V. CONCLUSIONS

13. We propose to delete Section 22.119 of the Rules to allow transmitters authorized under Part 22 to be concurrently licensed and used for both common carrier and private carrier operations. We believe that this proposed rule change will promote more effective use of carrier resources without undermining the rule's purpose. We request comments on the proposals addressed in this Notice. We also find it in the public interest to waive Section 22.119 to allow PacTel, Arch, PageNet, Metrocall, API, Mid Atlantic, and MobileMedia to operate their authorized Part 22 transmitters as set forth herein.

## VI. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED THAT pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j), 303(r), this Notice of Proposed Rule Making IS ISSUED.

15. IT IS FURTHER ORDERED THAT the Secretary shall cause a copy of this Notice to be sent to the Chief Counsel for Advocacy of the Small Business Administration.

16. IT IS FURTHER ORDERED THAT the waiver request filed by Paging Network, Inc. IS GRANTED, to the extent described herein, and conditioned on the outcome of the rulemaking proceeding.

17. IT IS FURTHER ORDERED THAT the waiver request filed by PacTel Paging IS GRANTED, to the extent described herein, and is conditioned on the outcome of the rulemaking proceeding.

18. IT IS FURTHER ORDERED THAT the waiver request filed by Arch Communications Group, Inc. IS GRANTED, to the extent described herein, and conditioned on the outcome of the rulemaking proceeding.

19. IT IS FURTHER ORDERED THAT the waiver request filed by Metrocall, Inc. IS GRANTED, to the extent described herein, and conditioned on the outcome of the rulemaking proceeding.

20. IT IS FURTHER ORDERED THAT the waiver request filed by American Paging, Inc. IS GRANTED, to the extent described herein, and is conditioned on the outcome of the rulemaking proceeding.

21. IT IS FURTHER ORDERED THAT the waiver request filed by Mid-Atlantic Paging Company, Inc. IS GRANTED, to the extent described herein, and is conditioned on the outcome of the rulemaking proceeding.

22. IT IS FURTHER ORDERED THAT the waiver request filed by MobileMedia Communications, Inc. IS GRANTED, to the extent described herein, and is conditioned on the outcome of the rulemaking proceeding.

23. For further information, contact Dan Abeyta, at (202) 632-6450, Mobile Services Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

  
William Caton  
Acting Secretary

## APPENDIX A

## PROCEDURAL MATTERS

## Ex Parte Rules -- Non-Restricted Proceeding

This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, as long as they are disclosed as provided in the Commission's Rules. See generally 47 CFR §§ 1.1202, 1.1203, 1.1206(a).

## Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before July 11, 1994 and reply comments on or before July 26, 1994. To file formally in this proceeding you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554.

## Initial Regulatory Flexibility Analysis

## Reasons for Action

This rule making proceeding is initiated to obtain comment regarding changes in the provision of common carrier and private carrier paging services through the use of a single transmitter.

## Objectives

The purpose of the proposed rule is to promote economic efficiencies for carriers in providing paging services.

## Legal Basis

The proposed action is authorized under Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j), 303(r).

## Reporting, Recordkeeping and Other Compliance Requirements.

None.

## Federal Rules Which Overlap, Duplicate or Conflict with These Rules.

None.

**Description, Potential Impact, and Number of Small Entities Involved.**

A rule change in this proceeding would benefit providers of common carrier and private carrier paging services by reducing costs. A number of these providers are small entities.

**Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.**

We have determined no specific alternatives.

**APPENDIX B****PROPOSED RULES**

Title 47 of the Code of Federal Regulations, Part 22, is amended as follows:

**Part 22 - Public Mobile Service**

1. The authority citation for Part 22 continues to read as follows:

**Authority: Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.**

2. Section 22.119 is removed and reserved.